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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 337

THOMAS W. BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals affirming the judgment of the District Court is reported at 204 F. 2d 666. The *per curiam* order of this Court vacating the judgment and remanding the cause to the Court of Appeals for consideration in light of the net worth cases decided December 6, 1954,[1] is reported at 348 U. S. 905-906. The

[1] *Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160.

opinion of the Court of Appeals reaffirming the judgment of the District Court (Pet. 21-33) is reported at 223 F. 2d 884.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1955 (Pet. 34), and the petition for rehearing was denied July 25, 1955 (Pet. 35). The petition for a writ of certiorari was filed on August 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish the petitioner's starting point net worth.

2. Whether the indictment is invalid because the only witness who appeared before the grand jury was a Government revenue agent.

3. Whether the trial court erred in admitting into evidence exhibits summarizing the Government's findings as to petitioner's net worth and claimed tax deficiencies, and in permitting the jury to have them during deliberations.

4. Whether the trial court committed reversible errors of omission or commission in instructing the jury.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person

required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

Petitioner's conviction, on the net worth theory, in the United States District Court for the District of Minnesota for knowingly attempting to evade his income taxes for the years 1945, 1946, and 1947, was affirmed by the Court of Appeals for the Eighth Circuit. On January 10, 1955, this Court vacated the judgment of the Court of Appeals and remanded the case to that Court for consideration in the light of this Court's decisions in the net worth cases. 348 U. S. 905-906. On the remand, the Court of Appeals reaffirmed the conviction.

The Government's prior brief in opposition to the first petition filed in this case (No. 13, October Term, 1954) contains (pp. 3-11) a detailed statement of the facts surrounding the conviction, to which this Court is respectfully referred. In view,

however, of petitioner's abandonment of some of the questions presented in his first petition for a writ of certiorari and his raising in the present petition of contentions not presented in the first (particularly those relating to the adequacy of the net worth starting-point evidence), we believe it to be desirable to state the following additional facts:

On July 2, 1937, petitioner submitted to the Government, in connection with an offer in compromise of alcohol taxes, an affidavit (Gov. Ex. 33; R. 337-340) "for the purpose of disclosing * * * [his] financial condition" (R. 339). This affidavit listed assets totalling $27,779.15 and liabilities totalling $14,500, and concluded that "it is my opinion that I am actually insolvent at the present time" and "the most I have ever been worth was $30,000 * * * about 1920." (R. 339.) No undeposited cash was listed. The starting point of the Goverment's computations was December 31, 1936, at which time petitioner's net worth, based upon an exhaustive investigation by the Government (R. 191, 327, 341, 354, 408, 425-426, 433), was determined to be $18,578.58 (Govt. Ex. 224; R. 511), a figure which agrees substantially with the admitted net worth as of July 2, 1937. Although the agents made a "diligent search" for evidence of cash on hand as of the end of 1936 they found none (R. 433), nor did petitioner claim any when given an opportunity to do so (Govt. Exs. 70, 71; R. 568-569). There was evidence that he was forced to borrow $7,800 in September, 1937, to pay taxes

in that year. (R. 434-435.) The investigation was also directed at the possibility that petitioner might have received substantial sums by gift or inheritance between 1937 and 1947, but no evidence of such receipts was found. (R. 330-331.)

While petitioner's net worth increases and expenditures tended to show net income for the years 1937-1944 (*i. e.*, the years between the starting point and the first prosecution year) of $278,764.87, the net income reported on his returns for those years totalled only $70,158.35. (Govt. Exs. 1-8, 224; R. 520-521.) It was then shown that petitioner's net income and tax liability for the prosecution years as claimed by the Government (based on the net worth-expenditures computations) compared with the reported amounts as follows (Govt. Exs. 224, 226):

	Net Income		Income Tax	
Year	Reported	Claimed by Government	Reported	Claimed by Government
1945.....	$20,170.11	$ 43,690.11	$ 7,675.27	$22,719.33
1946.....	27,100.99	36,799.97	10,556.98	16,386.39
1947.....	20,609.29	41,453.07	6,955.14	19,022.69
Totals.....	$67,880.39	$121,943.15	$25,187.39	$58,128.41

Although the major source of petitioner's reported income was "wagering" (Govt. Exs. 9-11), the agents were furnished no books or records relating to that activity (R. 184, 192, 198, 265-266). There was considerable independent evidence tending to show petitioner's wilfulness, *e. g.*, the holding of assets in the name of nominees (R. 412-413), and the handling of transactions in such a manner

as to make them extremely difficult to trace (R. 217, 244-246, 253, 265-267, 292-293, 322-328, 369-372, 433-435). Petitioner adduced no evidence to rebut the Government's case. The jury found him guilty on all three counts of the indictment.

ARGUMENT

1. Petitioner contends (Pet. 8-11) that the evidence of his net worth at the starting point was insufficient to present an issue for jury determination because (a) he was given credit for no undeposited cash although he had substantial dealings in cash, and (b) the admissions contained in his affidavit as to his net worth in 1937 were uncorroborated. Neither contention was raised in the first petition for certiorari [2] and neither has merit.

(a) Petitioner asserts a conflict between the instant case and *United States* v. *Costello*, 221 F.2d 668 (C. A. 2d) (No. 72, October Term, 1955), pointing out that there the Court of Appeals reversed defendant's conviction on the first count because it was not satisfied that the Government's determination that he had no opening cash on hand was correct. But in that case, as the court pointed out (p. 673), "in the past he had always kept such reserves in large amounts", which fact was indicated not only by defense testimony at the trial but by the very starting point evidence relied upon by the Government, an oral statement given to Treasury agents under oath by the defendant in 1937. (See

[2] The contention that the 1937 affidavit was uncorroborated was, however, raised in a supplement to the petition, filed sixteen months after the petition. (No. 13, October Term, 1954.)

Brief for the United States in Opposition to certiorari in *Costello* v. *United States,* No. 72, October Term, 1955, pp. 5, 7.) In the instant case there is the converse situation, for not only was there no claim of cash on hand advanced before or during the trial but the evidence affirmatively showed that petitioner had none at the starting point (*supra,* pp. 4-5). Under these circumstances any assumption that the net worth increase for a particular year or years might be accounted for by opening cash on hand would be completely unrealistic and speculative.

(b) The argument (Pet. 10-11) that the 1937 affidavit which constituted the starting point was not corroborated is equally unsound. In the first place, no corroboration was required for the document was plainly an admission *ante litem motam. Warszower* v. *United States,* 312 U.S. 342, 347-348; Cf. *Smith* v. *United States,* 348 U. S. 147, 152-155. Nevertheless, the admissions in the affidavit were directly and thoroughly corroborated by (1) a net worth investigation made by Treasury agents prior to the submission of the affidavit (R. 410, 533-534), and (2) the subsequent exhaustive investigation into petitioner's net worth and his financial dealings during the entire period 1937-1947 (*supra,* pp. 4-6), all of which pointed unerringly to the truth of the admissions. Indirect corroboration, *i.e.,* corroboration going to the *corpus delicti,* is found in petitioner's consistent net worth increases and expenditures far in excess of reported income (Govt. Ex. 224; R. 465-521) during years when he

was receiving unrecorded amounts of income (Govt. Exs. 9-11; R. 184, 192, 198, 265-266). *United States* v. *Calderon*, 348 U. S. 160, 168; *Smith* v. *United States*, 348 U. S. 147, 158-159.

2. Petitioner renews his contentions with respect to the validity of the indictment. (Pet. 11-13.) The lack of substance in these contentions was sufficiently demonstrated in our original brief in opposition in this case (No. 13, October Term, 1954, pp. 11-14), to which the Court is respectfully referred.

3. Petitioner contends (Pet. 16-19) that the trial court erred in admitting into evidence the Government's summaries of petitioner's net worth, expenditures, and tax deficiencies as claimed by the Government, and in permitting the jury to use them during its deliberations without "guarding instructions." (The portion of this contention relating to the alleged failure to instruct is treated under our Question 4 (*infra*, pp. 10-11). These contentions are without merit, for the summaries (Govt. Exs. 224 and 226)[3] were based entirely upon documents already in evidence and oral testimony in the record (R. 453-527). It is well settled that the use of such summaries is proper where the record presents a complicated set of facts. In *United States* v. *Kelley*, 105 F. 2d 912, 918 (C. A. 2d), the court said:

> This kind of evidence when based upon documents themselves competent and accessible,

[3] Exhibits 225 and 227 were enlargements of Exhibits 224 and 226, respectively.

is always admissible; a jury without such guidance would be totally unable to cope with complicated accounts.

Accord: *United States* v. *Schenck,* 126 F. 2d 702, 708 (C. A. 2d); *Bell* v. *United States,* 185 F. 2d 302, 306-308 (C. A. 4th), certiorari denied, 340 U. S. 930; *Hanson* v. *United States,* 186 F. 2d 61, 67 (C. A. 8th); *Bateman* v. *United States,* 212 F. 2d 61, 68 (C. A. 9th); *Graves* v. *United States,* 191 F. 2d 579, 584 (C.A. 10th). In *Holland* v. *United States,* 348 U. S. 121, 127-128, this Court implicitly sanctioned the practice, though warning that it might in some circumstances be dangerous should the summaries be sent to the jury without guarding instructions. The case of *Steele* v. *United States,* 222 F. 2d 628 (C. A. 5th), relied upon by petitioner (Pet. 18), is distinguishable on the facts. The reversal there rested principally upon the court's conclusion that the peculiar circumstances under which two charts were sent to the jury room after deliberations had begun invested them with a special "air of credibility" in the jury's eyes (p. 630).[4]

The danger envisaged by petitioner, that the

[4] The record does not support petitioner's assertion (Pet. 18) that "wall size replicas" of Exhibits 224 and 226 were "kept before the jury throughout the trial and during its deliberation on the verdict." The enlargements (size not shown) were brought into the courtroom on an easel near the end of the trial (R. 455, 457-458, 461) and the record does not show that they were ever taken to the jury room, nor that petitioner objected to the jury's taking with them even the unenlarged version.

jury might assume that the Government's charts were automatically to be accepted as correct, did not exist in this case. Any possible misconception that might have arisen from use of the term "Unreported Income" in Exhibit 224 was certainly erased by Exhibit 226, which set forth the reported income and taxes together with the "Taxable Net Income as Claimed by Government", the "Federal Income Taxes Gov't Claimed Should Have Been Reported" and the "Federal Income Taxes Gov't Alleges Should Have Been But Were Not Reported." The very nature of the charts plus the careful instructions of the court (*infra*, pp. 10-13) assured that the jury could not possibly be misled into thinking that they were bound to accept the Government's computations as correct.

4. Petitioner alleges three reversible errors in the court's instructions to the jury in that (a) no "guarding instruction" was given as to the use to be made of the Government's summaries (Pet. 17-18); (b) no instruction was given summarizing the net worth method and the "assumptions upon which it rests" (Pet. 13-14); and (c) an erroneous instruction was given on presumptive intent. The contentions are without substance.

(a) Although petitioner did not request any "guarding instruction" as to the jury's use of the Government's summaries (Exs. 224, 226) the court made it clear that it was for the jury to determine whether they were correct (R. 618):

> Hypothetical questions were put to a revenue agent on which he computed the tax which

the Government claims should have been paid for each of the three years involved.

You are instructed to determine whether the individual tax liabilities for the years here involved are correct as the same is set forth in the computations and charts made by the Government's expert witnesses in response to the hypothetical questions which assume the truth of the Government's evidence.

Moreover, as we have shown (*supra*, p. 10), the language of Exhibit 226 made it crystal clear that the figures represented only what the Government was alleging and were in no way binding upon the jury.

(b) It is true that the court did not comply literally with the dictum which appeared two and a half years later in *Holland* v. *United States*, 348 U. S. 121, 129, that the instructions should include "a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused." But when the entire charge (R. 610-623, 627) is read, it is clear that the court below was fully justified in concluding (Pet. 29) that every right of the defendant was protected; that there was no dispute as to the nature of the net worth method, which was clarified by the testimony and the arguments of counsel (R. 167-168, 197-198, 407-409, 511-515, 585-586); and that the petitioner has shown no prejudice resulting from the absence of a definition of the term "net worth." Petitioner's Requested In-

struction No. 11 (R. 582), relating to the starting point, was unnecessary because the Government's expert witnesses and counsel had plainly stated that if there was substantial error in the determination of starting point net worth there would be no basis for conviction (R. 194, 391, 408-409, 532-533). Moreover, it was clearly erroneous in stating that "it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947." (R. 582.) The Government had not reconstructed petitioner's net worth for every intervening year (Govt. Ex. 224) and was not required to do so. *United States* v. *Skidmore,* 123 F. 2d 604, 608-609 (C.A. 7th), certiorari denied, 315 U.S. 800; *United States* v. *Potson,* 171 F. 2d 495, 498 (C.A. 7th). And see *Friedberg* v. *United States,* 348 U.S. 142.

(c) Finally, petitioner contends (Pet. 14-16) that the trial court committed reversible error in giving the following instruction (R. 616-617):

> The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.
>
> The presumption is that a person intends the natural consequence of his acts and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of the tax, that he intended to evade and defeat the tax.

No objection to this part of the instruction was made at the trial and the point was first raised by petitioner in a letter to the Court of Appeals dated May 23, 1955, three years after the trial. When the quoted sentences are read in the context of the entire charge, as they must be (*Boyd* v. *United States,* 271 U. S. 104, 107), it is clear that the jury was properly instructed that petitioner was presumed to be innocent and that the burden was squarely on the Government to establish beyond a reasonable doubt a knowing and wilful attempt to evade. (R. 612-621, 627.) The case of *Morissette* v. *United States,* 342 U. S. 246, presented an entirely different factual situation wherein the trial judge instructed the jury that wrongful intent was conclusively presumed from the mere act, and refused to allow the defense to show or to argue that the act was done innocently. The case of *Bloch* v. *United States,* 221 F. 2d 786 (C. A. 9th), relied upon by petitioner to establish a conflict, is distinguishable on two grounds (1) the other instructions on wilfulness were clearly prejudicial, for they told the jury in effect that evidence of mere carelessness was sufficient to satisfy the requirement of wilfulness (Pet. 30); and (2) wilfulness was of the essence there, for Bloch's defense was that he had not acted wilfully. In the instant case the defense offered no evidence and the instruction as a whole obviated any confusion.[5] (R. 612-621.)

---

[5] The presence of the words "consciously, knowingly, or intentionally" (R. 617) would seem to foreclose the jury from indulging any presumption against petitioner.

As the Court of Appeals for the Ninth Circuit recently recognized in denying a petition for rehearing in the *Bloch* case (223 F. 2d 297, 298), each case presents a separate problem as to whether such an instruction is prejudicially erroneous. See *Legatos* v. *United States,* 222 F. 2d 678, 685-688 (C. A. 9th); *Bateman* v. *United States,* 212 F. 2d 61, 69-70 (C.A. 9th). In the instant case, the Court of Appeals was plainly correct in concluding (Pet. 31) that the instructions on intent "correctly stated the law, were plain and understandable, and left no room for doubt in the minds of the jurors."

CONCLUSION

There is no conflict of decisions, and the petition for a writ of certiorari presents no other questions which warrant further review by this Court. The petition should, therefore, be denied.

Respectfully submitted,

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SEPTEMBER, 1955.

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No. 337

IN THE

Supreme Court of the United States

October Term, 1955

THOMAS W. BANKS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF IN ANSWER TO BRIEF OF THE UNITED STATES IN OPPOSITION

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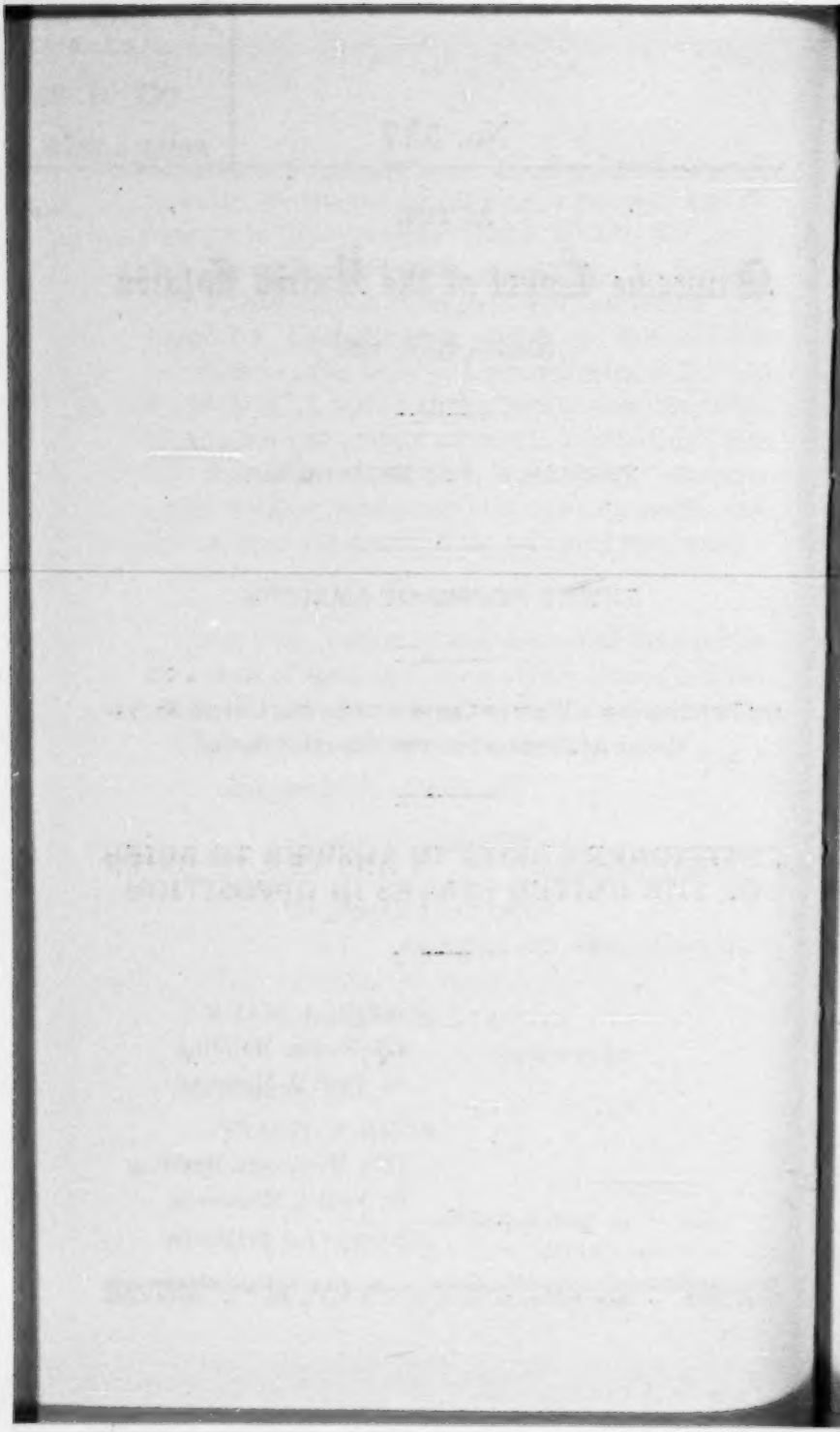

No. 337

IN THE

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October Term, 1955

THOMAS W. BANKS, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF IN ANSWER TO BRIEF OF THE UNITED STATES IN OPPOSITION

ARGUMENT

I.

In his petition for certiorari, defendant Banks alleged as error that the United States did not allow him even one cent of cash in the opening net worth statement, and cited *United States v. Costello,* 221 F. 2d 668 (C.A. 2d) (1955) in support

of his position. On page 7 of its brief in opposition, the United States, in its endeavor to distinguish the *Costello* case asserts:

> "In the instant case there is the converse situation, for not only was there no claim of cash on hand advanced before or during the trial but the evidence affirmatively showed that petitioner had none at the starting point."

That assertion of the Government is amazing in view of the fact that it is clear that the Government knew that defendant Banks did have cash on hand. For example, the Honorable Judge Bell, the trial judge in this proceeding, in an opinion refusing to modify defendant Banks' sentence, stated:

> "During the greater part of his active life the defendant has been engaged in business on an extensive scale and has owned property of large value. The greater part of his business has been done with the use of money * * *". (Supp. R. 42)

II.

On page 8 of its brief, the Government urges that the wall sized replicas of summaries of defendant Banks' alleged increase in net worth "were based entirely upon documents already in evidence and oral testimony in the record."

The fact is that one of the exhibits (Ex. 224) was completely prepared more than a year before the trial, with only minor modifications (R. 456).

The Government further urges as to these exhibits (Government's Brief in Opposition p. 9) that "the record does not show that they were ever taken to the jury room." Such an assertion is nonsense. If they were not taken to the jury room, obviously error occurred because all of the exhibits should be before the jury in its deliberations. If they were

taken into the jury room, error occurred because no guarding instructions whatsoever were given respecting their use by the jury.

In its brief before this Court (p. 10) the Government states that "the careful instructions of the court" made it impossible for the jury to be misled. The fact is that no instructions of any kind were given relative to these charts. In his instructions, Judge Bell stated to the jury:

> "Indeed, I have undertaken to avoid comment on the evidence and on the facts as I may view them." (R. 622)

How then can the Government conscientiously urge to this Court that guarded and careful instructions were given?

III.

In its brief before this Court (p. 11) the Government endeavors to pass over the admitted fact that no instructions of any kind whatsoever were given with respect to the net worth method, by the statement that the trial "court did not comply literally" with the rules enunciated in *Holland v. United States*, 348 U. S. 121. The real truth is that the trial court did not comply in any respect or sense at all. It refused a requested instruction on the net worth method and gave none of any kind of its own. As a matter of fact, the word "net worth" was not used throughout the instruction.

The Government asserts further that "there was no dispute as to the nature of the net worth method." Nothing could be further from the truth. Every objection defendant made throughout the long trial went to the very foundation of that method.

The Government further urges that in any event "defendant Banks has shown no prejudice resulting from the absence

of a definition of the term 'net worth'." (p. 11) The fact remains, however, that defendant was convicted. What greater evidence could there possibly be of prejudice? Failure to follow the rules enunciated by this Court even carried over to the detriment of the defendant in his appeal to the Court of Appeals for the Eighth Circuit, for in its opinion for rehearing, that court stated:

> "Defendant failed to report income from properties held jointly by him and others."

Such obviously was and is not the fact for the entire case of the Government was bottomed on the net worth theory solely and exclusively. As the chief prosecuting attorney for the Government stated during the course of the trial, the opening net worth statement "was the foundation stone for this case." (R. 194)

CONCLUSION

It is respectfully submitted that in the interests of justice the petition for certiorari should be granted.

Respectfully submitted,

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MOTION FILED NOV 14 1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 337

THOMAS W. BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 337

THOMAS W. BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, Thomas W. Banks, by his attorneys, Joseph A. Maun and John W. Graff, moves the Court for leave to file the attached Supplement to Petition for Writ of Certiorari, and in support of such motion states:

Since the filing of the petition for the writ in this cause, a tax evasion prosecution, important developments have taken place in another alleged tax evasion case wherein a petition has been filed with this Court. That case is *Frank Costello v. United States of America,* No. 72. It appears

that the action of this Court in that case may have a far-reaching bearing on the action which should be taken by this Court on the petition in the instant case.

As an aid to the Court in the analysis of this case to determine the impact on it of the above case, petitioner should be granted leave to file the attached supplement to his petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 337

THOMAS W. BANKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

I.

This term an order was entered by this Court granting certiorari in the case of *Frank Costello v. United States of America,* No. 72. That case and the instant case both involve questions relating to the proceedings had before the grand jury in which the indictment was returned. It will be noted that the Government's brief in opposition to the petition for certiorari in the *Costello* case (Gov. Br. pp. 8-11) relied heavily on the *Banks* case. Such great reliance was had by the Government in its brief in opposition, that the attorney for Costello deemed it necessary to file a reply brief outlining their views as to the decision of the Court of Appeals for the

Eighth Circuit in this, the *Banks* case (Pet. Reply Br. pp. 3-4). After the filing of those briefs, this Court granted the petition for certiorari but limited it to the question whether a defendant is required to stand trial and a conviction can be sustained where only hearsay evidence was presented to the grand jury which returned the indictment. In this, the *Banks* case, the third point (Pet. p. 3) of the petition raises the question of the validity of an indictment where there was no adequate legally admissible evidence produced before the grand jury which returned the indictment.

Principles of criminal procedure of great public import concerning indictments undoubtedly will be enunciated by this Court in the *Costello* case. This decision could very well affect the decision in the *Banks* case. Under these circumstances, it is respectfully urged that the petition in the *Banks* case should be considered in the light of the petition which was granted in the *Costello* case. These considerations compel us to respectfully suggest that the petition in the *Banks* case be granted forthwith so that it may be considered at the same time as the *Costello* case or that decision on the petition in the *Banks* case be withheld until after the announcement of the decision in the *Costello* case.

CONCLUSION

For the reasons set forth in the original petition and for the additional reasons set forth herein, the petition for a writ of certiorari should be granted. In lieu thereof, should the Court deem it more appropriate, the decision on the petition for a writ of certiorari should be withheld pending announcement of the decision in the *Costello* case.

Respectfully submitted,

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